

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TROY MICHELLE JOHNSON,)	
)	CASE NO. C13-1139-RSM-MAT
Plaintiff,)	
)	
v.)	REPORT AND RECOMMENDATION
)	RE: SOCIAL SECURITY DISABILITY
CAROLYN W. COLVIN, Acting)	APPEAL
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff Troy Michelle Johnson proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Disability Insurance Benefits (DIB) and Social Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda, the Court recommends this matter be AFFIRMED.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1971.¹ She completed the eleventh grade of high

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case

01 school and previously worked as a certified nurse assistant, tour guide, hospital admitting clerk,
02 and furniture mover. (AR 42, 66-67.)

03 Plaintiff protectively filed applications for DIB and SSI in August 2009, alleging
04 disability since September 1, 2007. (AR 140, 145.) Her applications were denied initially
05 and on reconsideration, and she timely requested a hearing.

06 ALJ Stephanie Martz held a hearing on August 30, 2011, taking testimony from
07 plaintiff and a vocational expert (VE). (AR 37-72.) On October 5, 2011, the ALJ rendered a
08 decision finding plaintiff not disabled. (AR 16-29.) Plaintiff timely appealed.

09 The Appeals Council denied plaintiff's request for review on May 31, 2013 (AR 1-6),
10 making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this
11 final decision of the Commissioner to this Court.

12 **JURISDICTION**

13 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

14 **DISCUSSION**

15 The Commissioner follows a five-step sequential evaluation process for determining
16 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it
17 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had
18 not engaged in substantial gainful activity since the alleged onset date. At step two, it must be
19 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's
20 fibromyalgia, status post carpal tunnel syndrome with status post carpal tunnel release,
21 depressive disorder, anxiety/panic disorder, and history of drug use severe. Step three asks

22 Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 whether a claimant's impairments meet or equal a listed impairment. The ALJ found
02 plaintiff's impairments did not meet or equal the criteria of a listed impairment.

03 If a claimant's impairments do not meet or equal a listing, the Commissioner must
04 assess residual functional capacity (RFC) and determine at step four whether the claimant has
05 demonstrated an inability to perform past relevant work. The ALJ found plaintiff had the RFC
06 to perform light work, specifically: she can lift and carry twenty pounds occasionally and ten
07 pounds frequently; she can stand and/or walk about six hours in eight-hour day, and sit about
08 six hours in an eight-hour day; and she can occasionally climb and frequently balance, stoop,
09 kneel, crouch, and crawl. The ALJ also found plaintiff can perform simple routine tasks and
10 some familiar detailed tasks, and should work away from the public, but can have occasionally
11 brief and superficial contact with coworkers and supervisors. With this RFC, the ALJ found
12 plaintiff unable to perform past relevant work.

13 If a claimant demonstrates an inability to perform past relevant work, the burden shifts
14 to the Commissioner to demonstrate at step five that the claimant retains the capacity to make
15 an adjustment to work that exists in significant levels in the national economy. Considering
16 the Medical-Vocational Guidelines and the testimony of the VE, the ALJ concluded there were
17 jobs existing in significant numbers in the national economy plaintiff could perform, such as
18 work as a stuffer, hand bander, surveillance system monitor, and selected security guard
19 positions. The ALJ, therefore, concluded plaintiff was not disabled at any time from the
20 alleged onset date through the date of the decision.

21 This Court's review of the final decision is limited to whether the decision is in
22 accordance with the law and the findings supported by substantial evidence in the record as a

01 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
02 more than a scintilla, but less than a preponderance; it means such relevant evidence as a
03 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881
04 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which
05 supports the final decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
06 F.3d 947, 954 (9th Cir. 2002).

07 Plaintiff argues the ALJ erred in failing to properly consider a cognitive disorder at step
08 two and beyond, in failing to provide sufficient reasons for rejecting the opinions of the
09 examining physician who diagnosed that disorder, and in giving greater weight to the opinions
10 of non-examining State agency consultants than to the opinions of the examining physician.
11 She requests remand for further administrative proceedings. The Commissioner maintains the
12 ALJ's decision has the support of substantial evidence and should be affirmed.

13 Step Two

14 At step two, a claimant must make a threshold showing that her medically determinable
15 impairments significantly limit her ability to perform basic work activities. *See Bowen v.*
16 *Yuckert*, 482 U.S. 137, 145 (1987) and 20 C.F.R. §§ 404.1520(c), 416.920(c). "Basic work
17 activities" refers to "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §§
18 404.1521(b), 416.921(b). "An impairment or combination of impairments can be found 'not
19 severe' only if the evidence establishes a slight abnormality that has 'no more than a minimal
20 effect on an individual's ability to work.'" *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir.
21 1996 (quoting Social Security Ruling (SSR) 85-28). "[T]he step two inquiry is a de minimis
22 screening device to dispose of groundless claims." *Id.* (citing *Bowen*, 482 U.S. at 153-54).

01 An ALJ is also required to consider the “combined effect” of an individual’s impairments in
02 considering severity. *Id.* A diagnosis alone is not sufficient to establish a severe impairment.
03 Instead, a claimant must show that his medically determinable impairments are severe. 20
04 C.F.R. §§ 404.1520(c), 416.920(c).

05 In this case, Dr. Silverio Arenas rendered March 2010 opinions as follows:

06 Mental status examination noted mild-to-significant problems in the areas of
07 attitude/behavior, affect/mood, thought flow, remote memory, recent memory,
08 knowledge fund, attention/concentration, and in judgement[sic]/insight with
09 other aspects being normal. The Burns scales suggested a severe level of
10 depression and an extreme level of anxiety with related symptoms. Overall, the
client’s abilities to reason and understand, attend/concentrate, remember, pace,
persist, and to tolerate/manage stress are all adequately functional relative to the
presenting problems, within present limited/curtailed interactive environment,
but would be dysfunctional outside of that, as in any competitive work situation.

11 (AR 591.) The “diagnoses suggested” included cognitive disorder, anxiety disorder, cannabis
12 and polysubstance dependence in reported full sustained remission, nicotine dependence,
13 depressive disorder, and personality disorder. (*Id.*)

14 The existence of a cognitive disorder diagnosis, standing alone, does not establish a
15 severe impairment. Nor is it clear whether Dr. Arenas found plaintiff more than mildly limited
16 in relation to a cognitive disorder given that he diagnosed numerous conditions and opined as to
17 “mild-to-significant problems” in a number of areas without differentiating between those areas
18 or the conditions diagnosed. As related to cognitive abilities, Dr. Arenas did, on mental status
19 examination (MSE), identify “thought flow” verbalizations that were “at times rapid/impulsive
20 or slowed/delayed”, errors in recent memory recall, and errors in attention/concentration on
21 serial seven subtraction and one error on a three-step command. (AR 589.) However,
22 plaintiff’s thought flow was “normal otherwise”, with no tangential ideation or

01 circumstantiality, and intact goal direction and cohesiveness; she was fully oriented; she had
02 general, but adequate remote memory; her immediate memory was intact with one error; her
03 knowledge fund was accurate as to seven out of nine questions asked; she, in relation to
04 attention/concentration, was able to perform serial threes, spell “world” forward and backward
05 quickly, and adequately followed conversation and attended to questions; and she had no
06 problems with perception, abstraction, or judgment/insight, outside of “continu[ing] to smoke
07 heavily in spite of health issues.” (*Id.*)

08 In any event, even assuming the evidence from Dr. Arenas is reasonably construed as
09 sufficient to establish a severe cognitive disorder impairment, the Court finds the failure to
10 deem this impairment severe at step two harmless error. As a general principle, an ALJ’s error
11 may be deemed harmless where it is “‘inconsequential to the ultimate nondisability
12 determination.’” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (cited sources omitted).
13 The Court looks to “the record as a whole to determine whether the error alters the outcome of
14 the case.” *Id.* Also, the failure to list an impairment as severe at step two is harmless where
15 limitations associated with that impairment are considered at step four. *Lewis v. Astrue*, 498
16 F.3d 909, 911 (9th Cir. 2007).

17 In this case, there is no question the ALJ considered evidence associated with a
18 cognitive disorder at step four. The evidence included that plaintiff was found to have no
19 cognitive deficits on MSE testing and assessed with no cognitive limitations by examining
20 physician Dr. Anselm Parlato in August 2006, June 2008, and April 2009. (AR 25, 297, 323,
21
22

599.)² While Dr. Parlature did assess marked limitations in some cognitive abilities in May 2011, he also stated: “No clinically relevant cognitive deficits.” (AR 738-39.) The ALJ found Dr. Parlature’s “extreme findings” in relation to social functioning, and the 2011 findings as a general matter, unsupported by counseling records or plaintiff’s reports to her care providers, noted he failed to explain or support his findings, including the change in cognitive limitations between June 2010 and May 2011, observed that the MSE’s were normal, and determined that it appeared Dr. Parlature based his opinions on plaintiff’s subjective reports, which the ALJ found not credible. (AR 25.) Plaintiff does not challenge, and the Court sees no error in the consideration of either Dr. Parlature’s opinions or plaintiff’s credibility.³

The ALJ subsequently considered the report from Dr. Arenas, but found the opinions expressed by this physician inconsistent with examination findings of few limitations, and deemed it “heavily based” on plaintiff’s self-reports, which the ALJ found not entirely credible. (*Id.*) She noted, as examples in support of this conclusion, that plaintiff “did not disclose recent work activity in the record including work for a family business and more recent work on a farm[,]” and that plaintiff “herself testified her depression was mild.” (AR 25.) The ALJ also considered and assigned significant weight to the opinions of non-examining physicians Dr. Thomas Clifford and Dr. John Robinson, dated in November 2009 and April 2010

² While the ALJ described Dr. Parlature’s June 2008 and April 2009 reports as assessing mild limitations in cognitive functioning, he, in fact, found no limitations in that area. (*Compare* AR 25, *with* AR 297, 323.)

³ Plaintiff did not, in her opening brief, challenge the ALJ’s credibility assessment. (*See* Dkt. 19.) To the extent she raises any such challenges in her reply (*see* Dkt. 25), the Court finds those arguments waived. *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) (“[A]rguments not raised by a party in an opening brief are waived.”) (citing *Eberle v. Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990)).

01 respectively and finding plaintiff could perform as reflected in the RFC assessed by the ALJ.
02 As addressed separately below, the Court finds no error in the ALJ's consideration of the
03 opinions of these physicians.

04 In sum, and considering the record and the ALJ's decision as a whole, the Court
05 concludes that the ALJ adequately considered the evidence associated with the cognitive
06 disorder diagnosed by Dr. Arenas in considering that physician's opinion and other medical
07 evidence at step four. Accordingly, the failure to discuss or identify a cognitive disorder as
08 severe at step two was, at most, harmless error.

09 Psychiatric Review Technique and Step Three

10 Upon identification of a colorable claim of mental impairment, an ALJ must apply a
11 "special technique[.]" 20 C.F.R. §§ 404.1520a(a), 416.920a(a); *Keyser v. Comm'r, Soc. Sec.*
12 *Admin.*, 648 F.3d 721, 725-26 (9th Cir. 2011). An ALJ's decision must include a specific
13 finding as to the degree of mental limitation in each of four broad functional areas, including:
14 activities of daily living; social functioning; concentration, persistence and pace; and episodes
15 of decompensation. §§ 404.1520a(c), (e); 416.920a(c), (e).

16 At step three of the sequential evaluation, the ALJ considers whether one or more of
17 plaintiff's impairments meets or equals an impairment listed in Appendix 1 to Subpart P of the
18 regulations. Each listing sets forth the "symptoms, signs, and laboratory findings" that must
19 be established in order for a claimant's impairment to meet the listing. *Tackett v. Apfel*, 180
20 F.3d 1094, 1099 (9th Cir. 1999).

21 Plaintiff argues error in the ALJ's failure to consider her severe cognitive disorder in
22 applying the special technique or in relation to listing 12.02 (organic mental disorders).

01 However, and again assuming error at step two, the Court finds no error established.

02 The ALJ applied the special technique in considering plaintiff's mental impairments,
03 finding mild restrictions in activities of daily living, moderate difficulties in social functioning
04 and in concentration, persistence, or pace, and no extended episodes of decompensation. (AR
05 20-21.) She provided sufficient support for her conclusions, pointing to: plaintiff's ability to
06 care for herself and her dogs, prepare her own meals, perform house and yard work (limited
07 only by pain and need to rest, not mental limitations), go outside once a day, drive a car, and
08 shop in stores once a month; plaintiff's ability to talk on the phone with others every day, ability
09 to get along with others, and her November 2011 report of having more social interactions with
10 friends; that she can pay bills, count change, and handle a savings account, has hobbies
11 including reading and crafts (with crafts limited due to pain), her report she followed written
12 and spoken instructions well, and her testimony she "would watch a movie and read books to
13 pass the time, and then clarified, when she could concentrate." (*Id.*) Even without specific
14 mention of a cognitive disorder at steps two or three, the ALJ's evaluation of the four broad
15 functional areas was proper and supported by substantial evidence in the record. Plaintiff fails
16 to demonstrate that, with identification of a severe cognitive disorder at step two, the ALJ's
17 application of the special technique would have been different in any respect.

18 Likewise, plaintiff demonstrates no error at step three. She, at most, merely asserts
19 error in the failure to consider a cognitive disorder listing. However, she sets forth no theory,
20 plausible or otherwise, as to how her impairment, alone or in combination with other
21 impairments, satisfies or equals a listing. *Lewis v. Apfel*, 236 F.3d 503, 514 (9th Cir. 2001) (no
22 error at step three where claimant "offered no theory, plausible or otherwise, as to how"

01 impairments equaled a listing). *See also Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005)
02 (“An ALJ is not required to discuss the combined effects of a claimant’s impairments or
03 compare them to any listing in an equivalency determination, unless the claimant presents
04 evidence in an effort to establish equivalence.”). Nor is any such theory apparent. *See, e.g.*,
05 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.01. This argument, as such, also fails.

06 Physicians’ Opinions

07 The ALJ was required to provide specific and legitimate reasons, supported by
08 substantial evidence in the record, for rejecting the contradicted opinions of Dr. Arenas.
09 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). The ALJ may reject physicians’ opinions
10 “by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
11 stating his interpretation thereof, and making findings.” *Reddick v. Chater*, 157 F.3d 715, 725
12 (9th Cir. 1998) (citing *Magallanes*, 881 F.2d at 751). Rather than merely stating her
13 conclusions, the ALJ “must set forth [her] own interpretations and explain why they, rather than
14 the doctors’, are correct.” *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir.
15 1988)).

16 As a general matter, more weight should be given to the opinion of an examining
17 physician than to a non-examining physician. *Lester*, 81 F.3d at 830. Also, “[t]he opinion of
18 a nonexamining physician cannot by itself constitute substantial evidence that justifies the
19 rejection of the opinion of either an examining physician or a treating physician.” *Id.* at 831
20 (cited sources omitted). However, “the report of a nonexamining, nontreating physician need
21 not be discounted when it ‘is not contradicted by *all other evidence* in the record.’” *Andrews v.*
22 *Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995) (quoting *Magallanes*, 881 F.2d at 752 (emphasis in

01 original).)

02 In this case, the ALJ accurately described the opinions of Dr. Arenas. (AR 25, 591.)
03 She also noted that Dr. Arenas recommended plaintiff continue medical care and mental health
04 services, and that her history of illegal substances may have been underreported. (AR 25 and
05 592.) The ALJ assigned “less weight” to the opinions of Dr. Arenas, finding them
06 “inconsistent with examination findings of few limitations.” (AR 25.) She elaborated:

07 He noted the few limitations were due to her limited/curtailed environment and
08 she would likely be dysfunctional in a competitive work environment.
09 However, given the findings on examination, I find that this opinion is heavily
10 based on the claimant’s self-reports, reports I do not find entirely credible. For
11 example, the claimant did not disclose recent work activity in the record
12 including work for a family business and more recent work on a farm. The
13 claimant herself testified that her depression was mild.

14 (*Id.*) The Court, for the reasons discussed below, finds the ALJ’s consideration of the opinions
15 of Dr. Arenas and other medical opinions of record legally sufficient.

16 An ALJ appropriately considers inconsistencies in rejecting a physician’s opinions.
17 *See Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (inconsistency with the record
18 properly considered); *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005) (rejecting
19 physician’s opinion due to discrepancy or contradiction between opinion and the physician’s
20 own notes or observations is “a permissible determination within the ALJ’s province.”);
21 *Morgan v. Commissioner of the SSA*, 169 F.3d 595, 603 (9th Cir. 1999) (internal
22 inconsistencies within and between physicians’ reports properly considered). Here, the testing
23 results from Dr. Arenas are reasonably construed as inconsistent with the opinions as to some
24 “significant” problems and an inability to function adequately in a competitive work setting.
25 (AR 591.) For example, in addition to the minimal findings relating to cognitive abilities

01 outlined above, Dr. Arenas noted plaintiff “[w]as cautiously friendly, cordial, apprehensive,
02 anxious, a bit defensive, guarded, but cooperative;” with pain behaviors and adequate eye
03 contact, that her facial expression “was toward the sad side, but flexibly responsive to
04 cueing[,]” and that her “subjective self-rating” for depression and anxiety were high. (AR
05 588-89.) The ALJ had also just prior to the assessment of Dr. Arenas’s opinions described the
06 normal MSE findings of Dr. Parlato. (AR 25.) To the extent plaintiff takes a different view
07 of the evidence, she fails to demonstrate the ALJ’s interpretation was not rational. *See*
08 *Morgan*, 169 F.3d at 599 (“Where the evidence is susceptible to more than one rational
09 interpretation, it is the ALJ’s conclusion that must be upheld.”) (citing *Andrews*, 53 F.3d at
10 1041). Also, while the ALJ did not list out the MSE findings of Dr. Arenas, she rejected Dr.
11 Arenas’s opinions based on inconsistency with those findings, and the Court has no difficulty in
12 understanding the basis for the ALJ’s conclusion. *See Magallanes*, 881 F.2d at 755 (“As a
13 reviewing court, we are not deprived of our faculties for drawing specific and legitimate
14 inferences from the ALJ’s opinion.”).

15 “An ALJ may [also] reject a treating [or examining] physician’s opinion if it is based ‘to
16 a large extent’ on a claimant’s self-reports that have been properly discounted as incredible.”
17 *Tommasetti*, 533 F.3d at 1041 (quoting *Morgan*, 169 F.3d at 602). In this case, the ALJ
18 provided a number of clear and convincing reasons for finding plaintiff not entirely credible,
19 including evidence of her inconsistent reporting about her substance use, discrepancies in the
20 record in relation to her reporting as to work activities and her level of education, numerous
21 other inconsistencies between her allegations as to the degree of her limitation and evidence in
22 the record, inconsistent objective medical evidence, and evidence of improvement in her mental

01 health symptoms and minimal evidence of mental health care and treatment. (AR 22-25.)

02 The ALJ here reasonably discounted the opinions of Dr. Arenas as based heavily on
 03 plaintiff's discredited self-reports. She noted Dr. Arenas's specific reference to plaintiff's
 04 "limited/curtailed interactive environment[,]” and pointed to specific, contradictory evidence in
 05 the record, including plaintiff's failure to disclose her recent work activity for a family business
 06 and more recent work on a farm, and her own testimony that her depression was mild. (AR
 07 25.) (*Compare* AR 24 (plaintiff testified she last worked six or seven years earlier in
 08 marketing, but elsewhere reported she stopped working in 2007, when her business folded, and
 09 was self-employed at the time; in July 2009, plaintiff told a provider “she works on a farm from
 10 5 a.m. to 3 p.m.”, which she denied at hearing; also noting she reported to an examiner in June
 11 2010 that she had not left the house in two years), *with* AR 588 (plaintiff reported to Dr. Arenas
 12 that she “has not been able to work in the past five years”).) (*See also* AR 24 (plaintiff reported
 13 in 2009 that she was “feeling much better since she has been in counseling[.]” and, in March
 14 2011, that she had met her treatment goals after six counseling sessions) and AR 49 (plaintiff
 15 testified she gets “depressed probably a few days out of the month.”)) As observed by the
 16 Commissioner, Dr. Arenas also reflects his reliance on plaintiff's self-reporting of her
 17 symptoms on the Burns Depression Checklist and Anxiety Inventory. (AR 590-91.)

18 The ALJ further properly relied on the contradictory evidence from the non-examining
 19 State agency physicians. (AR 26; AR 430-31, 580.)⁴ As demonstrated in the discussions
 20 above, the opinions of these physicians were not contradicted by all other evidence in the

21 4 As the Commissioner observes, the ALJ properly reflected the opinions of Dr. Clifford as
 22 expressed in the narrative portion of the form completed, not the preceding “check-box” portion of that
 form. (AR 26, 430-31.) *See* Program Operations Manual System (POMS) DI 25020.010 at B.1

01 record, with the evidence including normal MSE's on multiple occasions and contradictory
02 medical evidence, as well as numerous issues bearing on plaintiff's credibility. Also, the mere
03 fact that these physicians did not have the opportunity to review the report from Dr. Arenas
04 does not undermine the substantial evidence support for the ALJ's decision. *See Han v.*
05 *Bowen*, 882 F.2d 1453, 1458 (9th Cir. 1989) ("While Dr. Ebert would unquestionably have
06 been better informed had he reviewed the test results before concluding that Han is capable of
07 performing light or medium work, the Secretary's decision is nevertheless supported by
08 substantial evidence.") Therefore, the ALJ's assessment of this and other medical opinion
09 evidence of record has the support of substantial evidence and should not be disturbed.

10 Step Four

11 Plaintiff argues that, given the alleged errors discussed above, the ALJ erred in failing to
12 properly incorporate sufficient mental limitations into the RFC. However, because the Court
13 finds no error in relation to a cognitive disorder or the ALJ's consideration of the medical
14 evidence, this restating of plaintiff's argument fails to establish error at step four or step five.
15 *See Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1175-76 (9th Cir. 2008).

16 CONCLUSION

17 For the reasons set forth above, this matter should be AFFIRMED.

18 DATED this 1st day of April, 2014.

19
20 

21 Mary Alice Theiler
22 Chief United States Magistrate Judge